Supreme Court, U.S.
FILED
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No._____

In The

Supreme Court of the United States

DOLORES B. DAILEY,

Petitioner,

v.

BANK OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

. Proper procedure and process were not followed by the trial court, ecause property rights are fundamental and constitutional in nature, loes this present a constitutional due process challenge for appellate eview?

. Can the trial court confer its absolute immunity status by acting ointly with the respondent to deprive petitioner of property present a onstitutional due process challenge for appellate review?

. May the court sanction petitioner for pursuing constitutional roperty rights through the courts?

. Does the Ninth Circuit Court review of the Fourteenth mendment in the criminal context differ in its review in the civil ontext from other court jurisdictions?

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PRIOR OPINIONS

The Ninth Circuit Court of Appeals decision sought to be reviewed is an unpublished ruling Dolores B. Dailey v. Bank of America entered on June 22, 2004 (Appendix A). The Appeal was taken from a decision of the U.S. District Court of Nevada (Appendix B). A timely petition for rehearing was denied August 2, 2004.

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on June 22, 2004 by the Ninth Circuit Court of Appeals by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. §1254, and the U.S. Constitution, Amendment XIV.

STATUTES INVOLVED

U.S. Constitution, Amendment XIV §1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Procedural History

May 4, 1989 – Promissory Note in the amount of $250,000, maturity date May 4, 2009 was entered into between Dolores B. Dailey and Valley Bank of Nevada, which merged with Bank of America. The loan was guaranteed by the U.S. Small Business Administration (SBA), and secured by two pieces of real property, the business property and Petitioner's personal residence.

February 4, 1994 – Petitioner filed Chapter 11 and the court appointed a U.S. Trustee, Case No. BK-N-94-30572-JHT (Chapter 11).

September 13, 1994 – The U.S. Bankruptcy Court of Nevada issued an "Order Approving Appointment and Employment of Special Counsel."

December 5, 1994 – Complaint for Damages, Dailey v. Bank of America in the First Judicial District Court of the State of Nevada, In and For Carson City, Case No. 95-00273A.

July 2, 1996 - ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, Judge Michael R. Griffin, presiding, Case No. 95-00273A.

November 7, 1997 – Final Decree, Case No. BK-N-94-30572-JHT (Chapter 11).

January 22, 1998 – DEED OF RECONVEYANCE recorded in Carson City, Nevada.

February 5, 1999 – AFFIDAVIT OF GAYLE A. KERN, ESQ. IN RESPONSE TO THE COURT'S ORDER GRANTING MOTION FOR SUMMARY JUDGMENT.

May 17, 1999 – JUDGMENT, Judge Michael R. Griffin, presiding Case No. 95-00273A.

Factual Summary

Based solely on an Affidavit filed by the bank styled as a response to the court's order of July 2, 1996 the trial judge entered a Judgment on May 17, 1999. The trial judge without explanation or legal justification ordered Petitioner to pay all costs under the terms of the Promissory Note in this May 1999 Judgment. If the May 1999 judgment had merit the claim should have been presented to the Bankruptcy Trustee, not to the trial judge.

The bank in bad faith in order to profit asked the trial judge to enter costs that had been adjudicated in bankruptcy. Furthermore, the bank had given Petitioner a Deed of Reconveyance to her property. The trial judge with wanton disregard for Petitioner's constitutional rights overturned the decision of the federal bankruptcy court. The trial judge without points and authorities attached Petitioner's property. Petitioner under color of law and duress has been forced under threat of a lien sale to pay any and all costs demanded by the bank.

The bank has collected the full amount of the Promisory Note, plus interest on this note that would mature in 2009. Petitioner has paid the bank $228,849. SBA has paid the bank $175,567. The bank claims all of the $404,416 it has collected was applied to the Promissory Note and claims an outstanding debt in the amount of $50,087 as of December 4, 2003 on the judgment. The deficiency at the time of bankruptcy was $80,144, plus principal and interest.

Property historically is transferred by Deed. Petitioner was lulled into believing the monies paid out of an escrow in exchange for a Deed of Reconveyance would leave Petitioner free of debt to the bank and that she would have unfettered title to her property.

Shortly after the Deed was recorded the bank by Affidavit asked the trial judge to attach Petitioner's property. Petitioner was freed of debt to the bank by a federal court of bankruptcy. Petitioner was given title to her property free and clear of all encumbrances to the bank. The trial judge's order of May 1999 deprived Petitioner of her property after a deed was recorded. A trial judge cannot simply order a Deed to be encumbered after it has been recorded fee simple under color of law.

More egregious the trial judge rejected the argument that the bank was barred from entering the order at such an untimely date. Procedural law is due process of law. This is a fundamental constitutional right, which the trial judge disregarded in order to aid the bank in attaching Petitioner's property.

In order to resolve the dispute over the judgment debt Petitioner asked the bank for an accounting of all monies received to no avail. The State of Nevada does not regulate national banks and the Attorney Generals Office referred Petitioner to the Office of the Comptroller of Currency (OCC). The OCC informed Petitioner in writing that the bank refused to disclose its accounting records under the Freedom of Information Act.

ARGUMENT

Constitutional requirements of due process apply to attachment procedures whenever state officers act jointly with a private creditor in securing property. If the conduct of the creditor constitutes state action, then that conduct is also action under color of state law and will support a suit under §1983. The Court has held that private parties are amenable to suit under §1983 when jointly engaged with state officials in the violation of constitutional rights.

The Court has most consistently found state actor status in cases involving private invocation of state procedures and processes, where state power is brought to seize or attach property. The bank and the trial judge, a state officer acted together to deprive Petitioner of her constitutional rights to property. Without the usurpation and corruption of a state officer the bank a private entity would not be clothed with the authority of the state.

Historically property is conveyed by Deed, which titles property. NRS 17.200 mandates conveyance of property evidences satisfaction of judgment. It defies logic, common sense and reason to allow a bank to attach property by Affidavit. No property would be safe if based solely on an Affidavit the courts could attach property.

Rules of practice and procedure are devised to promote the ends of justice and are enacted to incorporate the spirit and intent of the Due Process Clause. NRS 18.110 is a procedural law enacted in 1865 to guarantee the due process clause of the Fifth Amendment. The Fifth Amendment is so important it is reaffirmed in the

Fourteenth Amendment, which provides remedy to parties deprived of constitutional rights by a state official's abuse of his position. The trial judge was prejudicial and did not enforce NRS 18.110.

Monroe v. Pape, under R.S. §1979 derived from §1 of the "Ku Klux Act" of April 20, 1870, U.S. 365 (1961): Pp167-168:

> "2. In enacting §1979, Congress intended to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. Pp. 171-187.
>
> (a) The statutory words "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did, or even who violated the state constitution and laws. Pp 172-187.
>
> (b) One of the purposes of this legislation was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies. Pp 174-180...
>
> (d) Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action "under color of" state law within the meaning of §1979. United States v. Classic, 313 U.S. 299; Screws v. United States, 395 U.S. 91. Pp 183-187."

The procedural history is part of the court record filed by the bank in its Motion to Dismiss. Due to the length of the pleading it

was filed under separate cover from Petitioner's Complaint. The court did not review the record in its entirety because of this procedural error. A review of the record will ascertain the merit of Petitioner's civil rights complaint.

Furthermore, the bank's accounting records are material facts and should be disclosed by order of the court. Petitioner will be forced under duress to continually pay under color of law a debt that was satisfied in bankruptcy and evidenced by a Deed of Reconveyance.

CONCLUSION

DAILEY had her most fundamental rights, the right of property violated by a trial judge Michael R. Griffin acting jointly with the respondent Bank of America in order to deprive petitioner of property by ordering forfeiture of property based on a false Affidavit, and with total disregard to accountability of monies received. The fundamental fairness demands reversal of this cause and restoration of Petitioner's property.

Dated: November 17, 2004.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-16973
D.C. No. CV-03-00411-HDM/RAM

DOLORES B. DAILEY,
Plaintiff – Appellant,

v.

BANK OF AMERICA,
Defendant – Appellee.

Appeal from the United States District Court for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Submitted June 14, 2004**
MEMORANDUM*

Before: HALL, LEAVY and KLEINFELD, Circuit Judges.

Dolores B. Dailey appeals pro se the district court's Fed. R. Civ.P.12(b)(6) dismissal of her 42 U.S.C. §1983 action against Bank of America for failure to state a claim. Dailey alleges that the Bank deprived her of her property in violation of due process when a lien was placed on some of Dailey's property as a result of the Bank's failure to give notice of a judgment to the United States Bankruptcy Court or the United States Trustee.

We conclude that the district court did not err in concluding that the Bank was neither a state actor nor acting under color of state law, and in dismissing Dailey's 1983 action. *See Karim Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988).

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App.P.34(a)(2).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DOLORES V. DAILEY,
Plaintiff, CV-N-03-0411-HDM-RAM
v. **ORDER**

BANK OF AMERICA NEVADA,
Defendant.

Before the court is Defendant Bank of America's motion to dismiss the complaint of Plaintiff Dolores Dailey for failure to state a claim.

A motion to dismiss for failure to state a claim should be granted when plaintiff can offer no factual support for her claim for relief. Fed. R. Civ.P.12(b)(6); Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). Dailey filed a complaint on September 3, 2003, against Bank of America in which her sole claim, as denominated in the caption, is an alleged violation of her civil rights under 42 U.S.C. §1983. She purports to invoke the jurisdiction of this court by specifically alleging a violation of the Due Process Clause of the Fourteenth Amendment.

Section 1983 applies only to the conduct of state actors, 42 U.S.C. §1983 (2003). It is clear from the face of the complaint that Dailey has not plead facts sufficient to demonstrate that Bank of America is a state actor. Dailey has thus failed to plead an essential part of the claim. Accordingly, her Section 1983 claim is dismissed. The court declines to address the remaining issue of res judicata.

The court has further concluded that Dailey's complaint is frivolous and is unsupported by both evidence and existing law. The court thus sanctions Dailey by ordering her to pay reasonable attorney fees in the amount of $2000.

Bank of America's Motion to Dismiss (#5) is GRANTED, and Dailey's Motion for Default Hearing (#8) and Motion for Summary Judgment Hearing (#10) are rendered moot.

It is so ORDERED.

This 12th day of October, 2003.

/s/ Howard B. McKibben
UNITED STATES DISTRICT COURT